



(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

RIN 0750-AI18

Defense Federal Acquisition Regulation Supplement: Photovoltaic Devices (DFARS Case 2014-D006)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify rules of origin under trade agreements for photovoltaic devices to be utilized under covered DoD contracts, as required by a section of the National Defense Authorization Act for Fiscal Year 2011.

DATES: Effective [Insert date of publication in the **FEDERAL REGISTER**.]

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before [Insert date 60 days after date of publication in the **FEDERAL REGISTER**], to be considered in the formation of a final rule."

ADDRESSES: Submit comments identified by DFARS Case 2014-D006, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2014-D006" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2014-D006." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2014-D006" on your attached document.
- o E-mail: dfars@mail.mil. Include DFARS Case 2014-D006 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6106; facsimile 571-372-6101.

SUPPLEMENTARY INFORMATION:

I. Background

Section 846 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111-383) addresses the origin of photovoltaic devices purchased by a contractor under an energy savings performance contract, a utility service contract, or a private housing contract, if such contract will result in DoD ownership of photovoltaic devices, by means other than DoD purchase as end products. DoD is deemed to own a photovoltaic device if the device is—

(1) Installed on DoD property or in a facility owned by DoD; and

(2) Reserved for the exclusive use of DoD for the full economic life of the device.

The statute requires that photovoltaic devices provided under covered contracts shall comply with the Buy American statute (41 U.S.C. chapter 83), subject to the exceptions to that statute provided in the Trade Agreements Act, or otherwise provided by law.

- Under the Buy American statute, there is an exception for other foreign photovoltaic devices, if covered by the Buy American statute and the cost of a domestic photovoltaic device would be unreasonable (i.e., 50 percent more than the cost of the foreign photovoltaic device).

- For DoD, qualifying country photovoltaic devices may be utilized in any covered contract, because DFARS 225.103(a)(i)(A) provides an exception to the Buy American statute for products of qualifying countries, as defined in 225.003.
- Depending on the value of the photovoltaic devices to be utilized, various trade agreements may apply to photovoltaic devices that are the product of a designated country. These photovoltaic devices may be broadly identified as World Trade Organization Government Procurement Agreement photovoltaic devices, Free Trade Agreement photovoltaic devices, or by the specific country of origin.

DoD initially implemented this statute through an interim rule (DFARS Case 2011-D046), published in the Federal Register on December 20, 2011 (76 FR 78858). The interim rule added a new DFARS section 225.7017, Utilization of domestic photovoltaic devices; a clause at 252.225-7017, Photovoltaic Devices; and a provision at 252.225-7018, Photovoltaic Devices—Certificate. DoD finalized the interim rule, with changes on May 22, 2012 (77 FR 30368).

The final rule explains that for purposes of determining that a photovoltaic device is eligible for an exception to the Buy American statute due to applicability of a trade agreement, the origin of a photovoltaic device is the country in which the photovoltaic device was wholly manufactured (including all

components), or the country in which the photovoltaic device was "substantially transformed" into a new and different article with a name, character, or use distinct from that of the article or articles from which it was transformed.

Since implementation in the DFARS, some questions have arisen as to where the substantial transformation of some solar panels occurs, when different phases of the production process occur in different countries. DOD has determined, after consultation with the United States Trade Representative, that clarification is needed to avoid confusion by offerors on how to determine the country of origin of a photovoltaic device, when trade agreements provide an exception to the Buy American statute.

II. Discussion and Analysis

This rule makes two clarifications to provide greater certainty and avoid confusion by offerors responding to solicitations that are governed by section 846 and the associated DFARS implementing provisions. Both clarifications are consistent with existing DoD practices.

First, the rule clarifies that the country of origin is the country in which the final substantial transformation occurred. Each of the definitions for specific types of designated photovoltaic devices has been amended to specify that the photovoltaic device is not subsequently substantially transformed outside of the specified country.

For example:

"Bahrainian photovoltaic device" means an article that—

- (i) Is wholly manufactured in Bahrain; or
- (ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of Bahrain.

Second, a new paragraph (c) has been added to the provision at 252.225-7018, which directs offerors to certify the origin of a designated country photovoltaic device consistent with country of origin determinations by U.S. Customs and Border Protection for the same or similar items. If the offeror is uncertain, the provision directs the offeror to request a determination from U.S. Customs and Border Protection. This guidance applies only to the origin of designated country photovoltaic devices (as defined in 252.225-7017(a)).

The origin of domestic photovoltaic devices and qualifying country photovoltaic devices is not based on substantial transformation, but on place of manufacture (regardless of the origin of the components). FAR 52.225-18 defines "place of manufacture" as the place where an end product is assembled out

of components, or otherwise made or processed from raw materials into the finished product to be provided to the Government (in this case the photovoltaic device to be utilized under the contract).

U.S.-made photovoltaic devices are not designated country photovoltaic devices, but their utilization is allowed, consistent with FAR 25.403(c), when the value of the photovoltaic devices utilized exceeds \$202,000, so that U.S.-made photovoltaic devices that do not qualify as domestic photovoltaic devices are not disadvantaged in favor of designated country photovoltaic devices. U.S.-made photovoltaic devices may be manufactured or substantially transformed in the United States. Therefore, a U.S.-made photovoltaic device may qualify on the basis of manufacture in the U.S., even if it does not meet the more stringent requirements of substantial transformation in the United States.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and

benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule only impacts the determination of whether photovoltaic devices are substantially transformed in a designated country. No domestic entities will be impacted because the United States is not a designated country. For the definition of "small business," the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 U.S.C. 601(3) and 15 U.S.C. 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: "(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which

makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.

Therefore, an initial regulatory flexibility analysis has not been performed. DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2014-D006), in correspondence.

V. Paperwork Reduction Act

The rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C chapter 35; however, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704-0229, entitled Defense Federal Acquisition Regulation Supplement (DFARS); Part 225, Foreign Acquisition.

VI. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to

promulgate this interim rule without prior opportunity for public comment. This action is necessary to ensure that section 846 of the National Defense Authorization Act for Fiscal Year 2011 is being appropriately implemented in accordance with DoD practices for achieving consistent adherence with international trade rules. Section 846 addresses the origin of photovoltaic devices acquired by DoD. The statute requires that photovoltaic devices comply with the Buy American statute, subject to the exceptions to that statute provided in the Trade Agreements Act (TAA), or otherwise provided by law. When an acquisition is subject to the TAA, the substantial transformation test is used to establish the origin of products. Questions have arisen regarding interpretation of the substantial transformation test for photovoltaic devices, in light of varying interpretations that have been issued by U.S. Customs and Border Protection (CBP) and the Department of Commerce in carrying out their respective missions. These opinions were issued after DOD published its final rule implementing section 846 in May 2012.

DoD has determined, after consultation with the United States Trade Representative, that clarification is necessary to avoid unintended confusion in the marketplace and potential non-compliance with section 846 and to ensure the proper and appropriate application of international trade rules. This rule makes explicit DOD's practice of generally following

determinations made by CBP regarding when an end product is considered to have been substantially transformed. Because this rule addresses "photovoltaic devices" rather than "end products," it also clarifies that the country of origin is the country in which the final substantial transformation occurred. These immediate clarifications will ensure that offerors are properly certifying their compliance with existing law and regulation addressing the acquisition of photovoltaic devices and provide greater certainty to the marketplace when offering these products to DoD at a time when the U.S. Government is working aggressively to take greater advantage of green energy industries as part of its comprehensive energy and environmental policies. The rule provides guidance to offerors that will facilitate offeror certifications that are consistent with existing DoD policy and practice when DoD directly acquires end products. Failure to implement this requirement promptly can also have adverse effects on the U.S. photovoltaic industry, which this statute was designed to protect.

DOD will consider, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Part 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore 48 CFR part 252 is amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for 48 CFR part 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Section 252.225-7017 is amended by—

a. Removing the clause date "(OCT 2013)" and adding "(DEC 2013)" in its place; and

b. In paragraph (a)—

i. In the definition of "Bahrainian photovoltaic device" in paragraph (ii), removing "transformed." and adding "transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of Bahrain." in its place.

ii. In the definition of "Canadian photovoltaic device", removing "transformed." and adding "transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of Canada." in its place.

iii. In the definition of "Caribbean Basin country photovoltaic device" in paragraph (ii), removing "transformed." and adding "transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of a Caribbean Basin country." in its place.

iv. In the definition of "Free Trade Agreement country photovoltaic device" in paragraph (ii), removing "transformed." and adding "transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of a Free Trade Agreement country." in its place.

v. In the definition of "Korean photovoltaic device" in paragraph (i), removing "Korea" and adding "Korea (Republic of)" in its place, and in paragraph (ii) removing "transformed." and adding "transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of Korea (Republic of)." in its place.

vi. In the definition of "Least developed country photovoltaic device" in paragraph (ii), removing "transformed." and adding "transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of a least developed country." in its place.

vii. In the definition of "Moroccan photovoltaic device" in paragraph (ii), removing "transformed." and adding "transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of Morocco." in its place.

viii. In the definition of "Panamanian photovoltaic device" in paragraph (ii), removing "transformed." and adding "transformed, provided that the photovoltaic device is not

subsequently substantially transformed outside of Panama." in its place.

ix. In the definition of "Peruvian photovoltaic device" in paragraph (ii), removing "transformed." and adding "transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of Peru." in its place.

x. In the definition of "U.S.-made photovoltaic device" in paragraph (ii), removing "transformed." and adding "transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of the United States." in its place.

xi. In the definition of "WTO GPA country photovoltaic device" in paragraph (ii), removing "transformed." and adding "transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of a WTO GPA country." in its place.

3. Amend section 252.225-7018 by—

a. Removing the clause date "(NOV 2012)" and adding "(DEC 2013)" in its place; and

b. Adding to paragraph (a) the phrase "designated country photovoltaic device" after the phrase "designated country";

c. Removing, in paragraph (b) (1), "(c) (2) (ii), (c) (3) (ii) or (c) (4) (ii)" and adding "(d) (2) (ii), (d) (3) (ii) or (d) (4) (ii)" in its place; and

d. Redesignating paragraph (c) as paragraph (d) and adding a new paragraph (c) to read as follows:

252.225-7018 Photovoltaic Devices—Certificate.

* * * * *

(c) Country in which a designated country photovoltaic device was wholly manufactured or was substantially transformed. If the estimated value of the photovoltaic devices to be utilized under a resultant contract exceeds \$25,000, the Offeror's certification that such photovoltaic device (e.g., solar panel) is a designated country photovoltaic device shall be consistent with country of origin determinations by the U.S. Customs and Border Protection with regard to importation of the same or similar photovoltaic devices into the United States. If the Offeror is uncertain as to what the country of origin would be determined to be by the U.S. Customs and Border Protection, the Offeror shall request a determination from U.S. Customs and Border Protection. (See <http://www.cbp.gov/xp/cgov/trade/legal/rulings/>.)

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